



Labor Law Compliance on Virginia Public Works Contracts

2021 Report as required by Chapter 56, 2020 Acts of Assembly &

Chapter 552, 2021 Acts of Assembly

Submitted by Dr. Megan Healy, Virginia Secretary of Labor

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I. Executive Summary

The Commonwealth's Secretary of Labor (previously the Commonwealth's Chief Workforce Advisor to the Governor) is submitting this report pursuant to [Chapter 56 of the 2020 Acts of Assembly](#) and [Chapter 552 of the 2021 Acts of Assembly](#). The 2020 legislative mandate directed the Secretary to convene a workgroup to review the Commonwealth's public works payment process to contractor employees to determine whether misclassification, payroll fraud, and other forms of wage theft are prevalent problems on Virginia public works contracts. In finding that they were, the workgroup was also tasked with identifying potential policies and process improvements to correct such issues.

The Secretary is required to submit the final report on potential strategies to combat labor law violations on state contracts to the Chairs of the House Appropriations Committee and Senate Finance and Appropriations Committee no later than October 1, 2021.

The workgroup was composed of representatives from the House Appropriations and Senate Finance and Appropriations Committees, Virginia public colleges and universities, labor organizations representing affected workers, the general contractor and subcontractor business community, and the relevant state regulatory and enforcement agencies. Additional subject matter experts were consulted as needed. The group met four times in total to review the Commonwealth's public works payment process, analyze strategies for potential implementation, and discuss their impacts on relevant stakeholders.

The Secretary also solicited public comment through an online survey that received 57 responses on behalf of relevant state regulatory and enforcement agencies, industry associations, and worker advocacy organizations. A summary of the responses is provided in [Appendix C](#).

In addition, the Secretary commissioned a study from George Mason University (GMU) of applicable labor laws across 11 states to identify statutes in both law and regulation that could inform this report's recommendations. A summary of the findings are outlined in [Section III](#), and the full multi-state survey is provided in [Appendix D](#).

The following recommendations were developed based on feedback from the workgroup, public comment, and external research. Each is associated with several policies that the Virginia Governor and General Assembly may consider to prevent the violation of labor laws related to wage theft and misclassification on

state public works projects. Implementation considerations and budgetary implications are outlined where applicable.

Recommendations

1. **The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.** Policies for consideration include: A) expanded grounds for debarment, B) federal debarment reciprocity, and C) the extension of debarment to other relevant entities.
2. **The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.** Policies for consideration include: A) an interagency advisory council, B) enhanced data sharing, C) enforcement of Virginia's labor laws through the Virginia Fraud Against Taxpayers Act, D) a centralized repository for subcontractor information, and E) proactive auditing of contractor data.
3. **The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.** Policies for consideration include: A) a monthly certified payroll requirement, and B) required compliance with state and federal labor laws.
4. **The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.** Policies for consideration include: A) an online reporting method for worker complaints, and B) an outreach campaign to workers and employers.
5. **The Commonwealth should develop standards for the use of independent contractors on state job sites to prevent misclassification before it occurs.** Policies for consideration include: A) an independent contractor waiver requirement and B) an independent contractor registration requirement.
6. **Policies requiring further research and consideration** are outlined at the conclusion of [Section IV](#).

II. Background

Labor Law Violations in the Commonwealth

The negative effects of labor law violations such as worker misclassification and wage theft reverberate across the economy. While hard-working Virginians are defrauded of the pay and benefits that they rely on to provide for their families, employers playing by the rules are left at a disadvantage. This results in less tax revenue for the state while non-compliant businesses enjoy significant payroll cost savings. In the case of misclassification, for example, research shows that a Virginia employer in the construction industry stands to save an estimated 26 percent over law-abiding competitors by engaging in this illegal practice.¹

The Virginia General Assembly first acknowledged the importance of these issues in 2011 when it adopted Senate Joint Resolution 345, which directed the Joint Legislative Audit and Review Commission (JLARC) to examine the prevalence and effects of misclassification in the Commonwealth. The resulting report served as the basis for later efforts by the Virginia Governor, legislators, and policy leaders to address this and other forms of wage theft head on. The Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud, established by Governor Northam's Executive Order 38 and led by the Governor's Secretaries of Labor and of Commerce and Trade, released 11 recommendations in 2019 to support Virginia workers in receiving the pay, workplace protections, and benefits they have rightly earned.

Governor Northam and Virginia General Assembly members have since worked diligently to strengthen the laws that protect the Commonwealth's workers from wage theft. Below is an overview of the expanded protections that were established during the 2020 legislative session as a result of the Governor's Interagency Taskforce Report.² Information on Tax and DOLI's enforcement of these laws to date can be found in [Appendix B](#).

HB 123 and SB 838: The Wage Theft Law, signed by Governor Northam on April 12, 2020, allows employees to either individually or collectively sue their employers for unpaid wages, a private right of action not previously available under Virginia law. Following its enactment on July 1st, 2020, DOLI received

¹ Joint Legislative Audit and Review Commission (VA), 2012, *Review of Employee Misclassification in Virginia*, Commonwealth of Virginia, Pg. iii, <http://jlarc.virginia.gov/pdfs/reports/Rpt427.pdf>.

² Inter-Agency Taskforce on Misclassification and Payroll Fraud (VA), 2019, *Report for Executive Order 38 (EO38)*, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

enhanced authority that allows the agency to investigate suspected wage theft cases that are uncovered in unrelated investigations.

In addition to owed wages and interest, a worker found to have been the victim of wage theft is now entitled to compensation for reasonable attorney's fees. In cases where wage theft was committed knowingly, employees can recover up to triple damages, and employers can face criminal charges up to a felony depending on the scale of the offense. General contractors operating in the construction industry are now also held jointly and severally liable for wage theft claims made against their subcontractors.

HB 1407 and SB 744 Misclassification Omnibus: Effective January 1, 2021, HB 1407 states that an individual performing services for an employer for remuneration is assumed to be an employee of the party that pays them unless it has been demonstrated that the individual is an independent contractor. To further protect Virginians, the law also prohibits employers from requesting that workers sign an agreement embracing a misclassified status or otherwise inaccurately reflecting the employment relationship.

The Department of Taxation is responsible for making determinations around independent contractor status in conformance with the guidelines laid out by the Internal Revenue Service. All occurrences of misclassification by the same employer within 72 hours will be treated as a single offense. If found to be in violation, employers will be subject to an escalating set of penalties.

Under the new law, a finding of misclassification is particularly impactful for contractors competing for public dollars. Following repeated determinations of noncompliance by the Department of Taxation, all public bodies will be prohibited from awarding a contract to violating employers for up to one year for a second offense and up to three years for subsequent offenses.

HB 1199 and SB 662 Retaliation: Effective July 1, 2020, the signing of HB 1199 protects employees and independent contractors who report misclassification from professional retribution. Workers facing illegal retaliation may file a complaint with the Commissioner of DOLI, who can institute remedies including reinstatement and lost wages following an administrative process.

SB 894 and HB 984 Misclassification Cause of Action: Effective July 1, 2020, an individual who has not been properly classified as an employee may bring civil action for damages against his or her employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification.

The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee to bring action. The measure provides that an individual who performs services for a person for remuneration shall be presumed to be an employee unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.

HB 1646 Board of Contractors Requirements: Effective July 1, 2020, this bill provides that the Board for Contractors shall require a contractor to appropriately classify all workers as employees or independent contractors, pursuant to law. Any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board of Contractors.

SB 48 and HB337 Wage Theft Discrimination: Effective July 1, 2020, an employer is prohibited from discharging or otherwise discriminating against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding, testified, or is about to testify in any proceeding related to nonpayment of wages.

SB 49 and HB 336 Wage Theft Investigations: Effective July 1, 2020, the Commissioner of DOLI is authorized to investigate whether an employer has failed or refused to make a required payment of wages to an employee who has filed a complaint. The bill also includes employees under the same accused employer who may have not filed a complaint but who it is reasonable to believe are experiencing wage theft. After initial complaints, written complaints or written and signed consent is not needed to institute proceedings on behalf of any employee against his or her employer for nonpayment of wages.

Labor Law Violations on Virginia Public Works Contracts

While the legislation outlined above has significantly strengthened the protections available to Virginia's workers, enforcement and prevention of violations continue to be key. Nowhere is this more obvious than on state public works projects, where evidence suggests wage theft and misclassification continue to harm workers despite the myriad rules in place to prevent them. Earlier this year, for example, a state investigation found that contractors working on the new Virginia General Assembly building had misclassified dozens of workers and thereby defrauded them of overtime pay and benefits including workers' compensation and unemployment

insurance.³ As a top buyer of goods and services across the state, the Commonwealth must ensure that these occurrences are not commonplace and that the public sector serves as a model for the private sector.

The Virginia General Assembly acknowledged the importance of ensuring compliance with labor laws on public works projects during the 2020 Special Session, when Delegate Carr introduced a budget amendment directing the Governor's Secretary of Labor to review the issue. The language is as follows:

"E.1. The Commonwealth's Chief Workforce Advisor to the Governor shall convene a workgroup to review the Commonwealth's state public works payment process to contractor employees to identify whether misclassification of workers is a prevalent problem. If the findings reveal such misclassification, the workgroup shall identify and make process improvement recommendations to correct any identified issues."

The resulting workgroup affirmed the reality of labor law violations on state contracts and the importance of addressing this issue for the benefit of workers, law-abiding contractors, and Virginia taxpayers. Members of the workgroup and other subject matter experts raised a variety of concerns with the public works bidding and payment process that served as the basis for the final policy considerations. Their consensus was that as both a major market participant and protector of the public interest, the Commonwealth must ensure the highest standards of legal conformity are met on both publicly and privately supported job sites. Virginia is well positioned to serve as a model of good business practice for private and local public employers to follow by more effectively enforcing its labor laws on state publicly funded job sites, incentivizing good business practices, and supporting a culture of compliance.

³ Martz, Michael, March 5, 2021, *State probe finds worker misclassification in construction of new General Assembly building*, Richmond-Times Dispatch, https://richmond.com/news/state-and-regional/govt-and-politics/state-probe-finds-worker-misclassification-in-construction-of-new-general-assembly-building/article_e5ba1226-d97b-560e-8052-ff227b5cc784.html.

III. Multi-State Survey of Relevant Labor Laws

While federal statutes such as the Fair Labor Standards Act (FLSA) and Davis-Bacon Act have far-reaching impacts on United States labor laws, individual states also have significant leeway to shape and enhance their realization. As Justice Louis Brandeis said in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932): states serve as critical “laboratories of democracy” by searching for their own unique solutions to difficult problems.

For this reason, the Virginia Secretary of Labor, in collaboration with the Virginia Department of Labor and Industry (DOLI), commissioned a study from George Mason University (GMU) of applicable labor laws across the following 11 states: Maryland, Pennsylvania, New Jersey, New York, Connecticut, Illinois, Minnesota, Nebraska, Montana, Oregon, and Washington. GMU was tasked with identifying statutes in both law and regulation that:

- ❖ address wage theft, by that name or otherwise;
- ❖ require or authorize state agencies to share information and coordinate actions regarding employers found to have engaged in wage and hour violations, especially in the field of employee misclassification;
- ❖ prescribe standards or principles by which employee/independent classification decisions are made;
- ❖ address exempt/nonexempt standards for considering alleged wage and hour violations;
- ❖ address payroll fraud perpetrated by government contractors specifically;
- ❖ impose payroll certification requirements as part of a public project prevailing wage statute; and
- ❖ provide civil or criminal sanctions for “labor trafficking.”

There are several areas where the analysis of other states reveals potential challenges, opportunities, and uncharted territory for the Commonwealth as it works to ensure compliance with labor laws on state contracts. The following observations in particular have informed the policy considerations that will follow in this report. For additional information, GMU’s full analysis is available in [Appendix D](#).

Inter-agency Information Sharing: Three observations arise on this topic: (a) most of the surveyed states have not yet taken steps to require or even encourage information sharing across agencies where labor law

violations have occurred; (b) that seems likely to change in the short term, as a number of states (e.g. New York, Oregon) have empaneled groups of experts and stakeholders with the goal of improving cross-agency communications; and (c) some states have established information-sharing mandates that require relevant enforcement agencies to collaborate. Beyond information sharing, some states have also authorized cross-agency agreements regarding prosecution or enforcement of possible labor law violators.

Payroll Fraud By Government Contractors: Few states among those studied have independent criminal or civil statutes addressing this issue. This appears to be likely because other, less specific statutory schemes address the subject adequately. Most states have a “little False Claims Act,” patterned to one degree or another on the federal statute of that name. These statutes usually (although not always) act as “private attorney general” statutes that encourage civilians aware of fraud against the government to alert state officials and either share in the damages that flow from government prosecution of a civil case or allow the individual to prosecute the action on his or her own. Even where no state False Claims Act exists, criminal sanctions are available against one who attempts to defraud the government.

Payroll Certification As to Prevailing Wage Compliance: Just as many states have their own FLSA-type statutory regimes and “little False Claims Act” statutes, many have their own “little Davis-Bacon” prevailing wage statutes. In the prevailing wage area, however, the states stray further from the federal design. The GMU report focused specifically on the question of whether the studied states have a requirement that a contractor or subcontractor (or the former on behalf of the latter) must certify that they have been paying, or have paid, the prevailing wage on their projects. Some require an oath and affirmation both on the front end (in the contract), during (in periodic bi-monthly or monthly payroll statements), and on the back end (before the project is finally accepted by the agency). Others require what is called a “certification,” but without the explicit requirement that it be under oath. Others require no statement at all until the matter has been drawn into question by an allegation of wrongdoing. Finally, the consequences of a failure to certify or pay the prevailing wage vary considerably, in some cases leading to long-term debarment.

For additional information, GMU’s full analysis is available in [Appendix D](#).

IV. Policy Considerations

The five recommendations outlined in this section were developed through external research, discussions with workgroup members, and feedback from public comment. Each recommendation is associated with several policies for consideration that fall into one or more of the following categories: Legislative (including budget amendments), Agency, and/or Executive Branch. Budget implications are outlined where applicable.

It is important to note that while many of the following recommendations refer broadly to state contracting and enforcement agencies, there are many other categories of organizations engaged in the procurement of goods and services across the Commonwealth. All initiatives should be developed with this in mind by incorporating covered institutions and local governments where possible.

Recommendations

1. **(Page 13) The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.** Policies for consideration include: A) expanded grounds for debarment, B) federal debarment reciprocity, and C) the extension of debarment to other relevant entities.
2. **(Page 15) The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.** Policies for consideration include: A) an interagency advisory council, B) enhanced data sharing, C) enforcement of Virginia's labor laws through the Virginia Fraud Against Taxpayers Act, D) a centralized repository for subcontractor information, and E) proactive auditing of contractor data.
3. **(Page 18) The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.** Policies for consideration include: A) a monthly certified payroll requirement, and B) required compliance with state and federal labor laws.
4. **(Page 21) The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.** Policies for

consideration include: A) an online reporting method for worker complaints, B) an outreach campaign to workers and employers, and C) certification and professional development requirements for contractors.

5. **[\(Page 24\)](#) The Commonwealth should develop standards for the use of independent contractors on state job sites to prevent misclassification before it occurs.** Policies for consideration include: A) an independent contractor waiver requirement and B) an independent contractor registration requirement.

Several policies were submitted during the public comment period but require additional research before implementation. These are listed under [Additional Considerations](#).

Recommendation 1. The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.

In the event that a contractor is found to have violated certain state or local laws, the Virginia Public Procurement Act (VPPA) authorizes debarment of the business “from contracting for particular types of supplies, services, insurance or construction, for specified periods of time.”⁴ Entities can be debarred for a variety of reasons including a breach of contract with a state agency, bribery of a procurement official, or the violation of anti-discrimination provisions.⁵ This is a powerful tool for ensuring that the state avoids doing business with non-responsible contractors and thereby decreases the likelihood of future illegal activity on state public works projects.

While the Virginia Code generally allows for debarment for “any cause indicating that the individual or firm lacks the moral and business integrity and reliability that will assure good faith performance⁶,” additional clarity is needed on the specific labor law violations that would constitute grounds for debarment in the Commonwealth. At the federal level, for example, the Secretary of Labor is explicitly authorized to debar contractors under the Walsh-Healey Act (41 U.S.C. § 37), the Davis-Bacon Act (40 U.S.C. § 3144), and the Clean Water Act (33 U.S.C. § 1368), among others.⁷ The Commonwealth should evaluate where an expansion of its own debarment authority beyond misclassification⁸ would be warranted in order to cover more instances of noncompliance with local, state, and/or federal labor laws.

Policies for Consideration

A. Expanded Grounds for Debarment (Legislative): Virginia could prevent all public bodies and covered institutions from awarding a contract to any employer who is found to have willfully and repeatedly violated state labor laws. In parity with the existing penalty for misclassification, this would entail debarment for a

⁴ VA. Code §§ 2.2-4300 to -4377, <https://law.lis.virginia.gov/vacodefull/title2.2/chapter43/>.

Note that certain entities and procurements are exempt from the Virginia Public Procurement Act.

⁵ Division of Purchases and Supply, Department of General Services, (VA), 2019, *A Vendor's Guide on How to do Business with the Commonwealth of Virginia*, Commonwealth of Virginia, pg. 54, section 7-20, https://dgs.virginia.gov/globalassets/business-units/dps/documents/vendorsmanual/vendorsmanual_2019_final.pdf.

⁶ VA. Code §2.2-4300 to -4377.

⁷ Congressional Research Service, *Debarment and Suspension of Government Contractors: An Overview of the Law Including recently Enacted and proposed Amendments* (RL34753), Prepared by Kate M. Manuel, 2008, <https://sgp.fas.org/crs/misc/RL34753.pdf>.

⁸ VA. Code § 58.1-1902. <https://law.lis.virginia.gov/vacode/58.1-1902/>.

period of up to one year from the date of the notice for a second offense and for a period of up to three years for a third or subsequent offense. In line with states such as New Jersey and Pennsylvania, Virginia labor laws for which a violation would constitute grounds for debarment could include those governing overtime wages, minimum wage standards, prevailing wage standards, discrimination in wages, occupational safety, and child labor. DOLI or other relevant enforcement authority would be responsible for notifying all public bodies and covered institutions of the name of the employer in the event of a violation.

- B. Federal Debarment Reciprocity (Legislative):** Virginia could establish a reciprocal statute that prevents any contractor debarred by the federal government from being awarded a Virginia public works contract unless the relevant state agency or authority determines that it is in the best interest of the Commonwealth, pursuant to the authority's written debarment policy⁹. In New York, agencies and/or authorities refer to the federal System for Award Management at the following link to determine if a bidder has been federally debarred: <https://sam.gov/content/home/>. Further research is needed to determine if a reciprocal statute for debarment in other U.S. states is feasible.
- C. Extension of Debarment to Other Relevant Entities (Legislative):** The Commonwealth could codify the ability of contracting agencies to extend its debarment to other entities that have a common ownership relationship with the debarred contractor in order to limit a business owner's ability to hide under another entity. [NJ Rev Stat § 34:11-56.38 \(2013\)](#) may serve as an example.¹⁰ While this is already practiced by DGS, additional consideration is needed into how this might be extended to other contracting bodies in the Commonwealth.

⁹ Department of Transportation (VA), n.d., *Debarment and/or Suspension Policy*, https://www.virginia.gov/projects/resources/Exhibit_D_debarment_procedures.pdf.

¹⁰ N.J. Code § 34:11 - 56.38, <https://law.justia.com/codes/new-jersey/2013/title-34/section-34-11-56.38/>.

Recommendation 2. The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.

For the purposes of this report, “strategic enforcement” is defined as an approach that uses state agencies’ limited enforcement resources in a data-driven and deliberate manner in order to enhance their overall impact on employer behavior. This can include using data to map out geographic or industry trends across labor law violations, going beyond complaints to conduct audits and proactive investigations in high-risk sectors, and collaborating with businesses at the top of their industry that have a strong history of compliance. Research has shown that while complaint-based enforcement is more likely to reveal a violation, strategic enforcement has greater ripple effects on compliance across the industry.¹¹ Additional research is needed, but the following policies represent the beginnings of a more strategic enforcement infrastructure for the Commonwealth.

Policies for Consideration

- A. Interagency Advisory Council for Ongoing Coordination (Legislative, Executive Branch, Agency):** In a manner similar to New York, Virginia could establish a permanent interagency council to combat wage theft and misclassification on both state public works projects and within the private sector¹². The Interagency Advisory Council Against Worker Exploitation would be responsible for regularly monitoring data on labor law compliance on state contracts, analyzing strategic enforcement strategies for potential implementation, gathering input from the public, and developing ongoing recommendations to the Virginia General Assembly and Governor. This group could also be responsible for evaluating the strategies within this report that have been flagged as needing further research.
- B. Enhanced Data Sharing (Legislative, Agency):** The Commonwealth could establish a legislative mandate that all relevant regulatory and contracting agencies cooperate to share information on confirmed labor law violations to better streamline statewide enforcement activities.

Currently, the Virginia Department of Taxation is required to refer information on employers determined to have misclassified their employees to regulating agencies such as the Virginia Department of Labor and Industry, Virginia Employment Commission, and Department of Small Business and Supplier Diversity.

¹¹ Weil, David, 2010, *Improving Workplace Conditions Through Strategic Enforcement*, Boston University, <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/strategicEnforcement.pdf>.

¹² N.Y. Executive Order 2016-159, July 20, 2016, https://www.governor.ny.gov/sites/default/files/atoms/files/EO_159.pdf.

VOSH will also refer contractors that are found to be unlicensed on state job sites to DPOR/VEC. The data sharing mandate would expand this activity among the members of the aforementioned interagency council and include a requirement that agencies develop common data standards and a data-sharing agreement.

- C. Enforcement of Virginia Labor Laws through the Virginia Fraud Against Taxpayers Act (Executive, Agency):** The Office of the Governor and relevant regulatory agencies could collaborate with the Office of the Attorney General to establish a process for the prosecution of unlawful contractors on state projects through the Virginia Fraud Against Taxpayers Act.¹³ Other states such as Massachusetts and Illinois have taken advantage of their false claims statute to target contractors who have falsely certified information to the state with regards to prevailing wage, wage theft, and misclassification.¹⁴ This approach, with more substantial penalties than those in existing labor law, could be strategically employed against instances of willful and egregious misclassification or wage theft.
- D. Centralized Repository for Subcontractor Information (Agency):** The Public Body Procurement Workgroup, established through a 2021 budget amendment and led by DGS, was tasked with providing best practices associated with oversight of subcontracts to include reporting requirements for payroll records, contracts, and payments to other businesses.¹⁵ In alignment with this group's recommendations, the Commonwealth should consider instituting a process whereby prime contractors, state agencies, and covered institutions provide awarded capital outlay contracts above \$3 million in a centralized reporting system. This would provide the state with greater visibility into the presence and activity of subcontractors on state public works projects.

Prime contractors would be required to gather the information from their subcontractors for entry into this system. Information requirements to achieve SWaM and oversight goals through centralized reporting would be determined by the audit and enforcement agencies within the aforementioned interagency council. Consideration is needed into the specific data elements that will be gathered, particularly if the state adopted a monthly certified payroll requirement as outlined under [Recommendation 3](#). If developed, this method

¹³ VA. Code § 5.01-216.3, <https://law.lis.virginia.gov/vacode/title8.01/chapter3/section8.01-216.3/>.

¹⁴ Ortiz, Nicholas F. (2016). "Prevailing Wage and False Claims Acts," *Massachusetts Wage Law*, <https://masswagelaw.com/prevailing-wage-false-claims-act/>.

¹⁵ VA. H.B. 1800, Item 82 #1h, 2021 Special Session I, 2021, <https://budget.lis.virginia.gov/amendment/2021/2/HB1800/Introduced/FA/82/1h/>

should be efficient and effective for state agencies, covered institutions, and contractors, which may include building interfaces between purchasing systems.

Preliminary Fiscal Impact: It is anticipated that the aforementioned audit and enforcement agencies will require additional investigators to audit subcontractor data. There will also be a cost for centralized reporting that involves linking the state's existing procurement system (eVA) with those of six higher education, or "covered", institutions. Additional information is needed before the fiscal impact can be determined.

- E. **Proactive Auditing of Contractor Data (Agency):** Audit and enforcement agencies with authority to ensure compliance and oversight could perform an audit of selected contractor data. The selection of contractors to be audited would be done in a manner prescribed and/or facilitated by the audit agency and in collaboration with the aforementioned interagency council. Final audit findings, as determined by the audit agency, should be communicated to the owner agency, DGS or appropriate covered institution, and to the interagency council.

Preliminary Fiscal Impact: Depending on the number of audits being executed, agencies will likely require additional staff to review the pay records and documentation of employers onsite. DOLI estimates the need for two additional compliance officers, each at \$99,070 per year, to perform audits of selected contractor data. The Department of Taxation, which has an existing audit program for misclassification, has also requested additional auditors and an audit team lead to conduct investigations.

Recommendation 3. The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.

The strategy of requiring contractors to certify relevant information to the state, often employed at the federal level, allows non-compliance to be identified more promptly and establishes a paper trail for enforcement authorities to later follow. It could also potentially preempt violations of the law by ensuring that prospective bidders are educated on their minimum contractual obligations.

Policies for Consideration

A. Monthly Certified Payroll Requirement (Legislative, Agency): Virginia could establish a monthly payroll certification requirement for contracting employers to ensure that they are meeting their prevailing wage obligations, including both hourly pay and fringe benefits, throughout the length of the contract.

In line with comparable states such as Maryland and New Jersey, DOLI would need an online system to receive the certified payroll submissions and sufficient staff to monitor and conduct audits based on complaints and/or inconsistencies flagged within the data. Per input from workgroup members, it is recommended that Virginia use similar technology systems and/or processes to those that are required at the federal level, making them more easily incorporated into many contractors' existing business processes.

Additionally, while employers are currently required to maintain records of wages and provide them to the Commissioner upon request, there is no penalty for a failure to do so. Several states surveyed by George Mason University for this report have instituted penalties for a failure to provide records, and for a failure to certify payroll where required. Alongside the institution of a monthly certified payroll requirement, the Commonwealth should also establish either a set fine or a per day, per employee penalty for non-compliance.¹⁶

Preliminary Fiscal Impact: It is estimated that this policy would have a general fund expenditure impact on DOLI, which would be responsible for administering the monthly certified payroll program. DOLI anticipates that start-up costs will be \$1.1 million in FY 2023 and ongoing operational costs will be \$542,063 annually.

¹⁶ See Appendix D. Pg. 56, multi-state survey

Fiscal Year	\$ Dollars	Positions	Fund
2022	N/A	0	N/A
2023	\$1,098,063	5.0	GF
Recurring (2023 -)	\$542,063	5.0	GF

DOLI anticipates that five additional staff (FTEs), including four labor law compliance officers and one financial services specialist, would be needed to monitor data and conduct audits. Most of the investigations will require regular onsite visits but some may involve inquiries into more complex fiscal dealings involving the fringe benefits that are part of most prevailing wage determinations. Maryland, which received 154,000 certified payrolls per year, has five employees to monitor the system. New Jersey estimates that four of their labor law investigators have been needed. The estimated recurring cost for these five additional staff is \$498,063.

In addition to staffing, DOLI estimates that it would require start-up costs of approximately \$600,000 in order to upgrade its payment of wage computer system to a more modern and responsive program. This upgrade would include a portal for employers to submit their monthly certified payroll information as well as an online complaint form as described under [Recommendation 4](#). Recurring expenses would include a yearly licensing fee of \$24,000 for the payment of wage system and an ongoing VITA security scan for \$20,000 that is conducted to ensure personally identifiable information remains protected.

- B. Required Compliance with State and Federal Labor Laws (Legislative):** Within the state's process for competitive sealed bidding or competitive negotiation under the [Virginia Public Procurement Act](#) (VPPA), public bodies could be required to include in every written contract a provision that prospective contractors must be in compliance with the labor laws of the Commonwealth, other U.S. states, and/or the federal government, and that they are not currently debarred in any of these jurisdictions. Labor laws for certification could include those governing overtime wages, minimum wage standards, prevailing wage standards, discrimination in wages, occupational safety, and child labor. The written contracts should include language and an overview of the applicable laws to support the education of the prospective contractor, to be developed by DGS in collaboration with the relevant labor agencies.

This provision would allow DGS to immediately institute debarment proceedings if they find, based on information provided from an enforcement agency such as DOLI, that a contractor has falsely certified their compliance with labor laws. An additional penalty, such as a fine or Class 1 misdemeanor, could also be established for violations of this rule but should be administered by the enforcement agency rather than the contracting entity.

Recommendation 4. The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.

While an important component of federal, state, and local enforcement infrastructure, the approach of requiring workers to complain to the relevant agency when they suspect that their labor rights have been violated has significant limitations. Research shows that the number of worker complaints regarding minimum wage, for example, is often significantly lower than the number of violations occurring in a given industry.¹⁷ This demonstrates the importance of educating workers on their rights and removing barriers to the complaint process to increase the likelihood that victims access protection.

Policies for Consideration

A. Online Reporting Method for Worker Complaints (Legislative, Agency): Virginia could require that DOLI establish a central online form for workers, including those employed by state contractors, to submit payment of wage, minimum wage, and overtime complaints electronically. This tool should be prominently displayed on the agency's website alongside existing electronic forms and other methods of complaint for labor law violations such as misclassification, occupational safety, etc., all of which should be available in multiple languages.

Currently, Virginians may only submit a claim for unpaid wages by U.S. postal mail.¹⁸ Taxpayers must contact the Department of Taxation's Customer Service Unit regarding instances of potential misclassification. The Commonwealth would be following the example set by states such as Kentucky, Colorado, and Idaho by removing these barriers to an already difficult process for workers.

Preliminary Fiscal Impact: It is estimated that this policy would have a general fund expenditure impact on DOLI, which would be responsible for developing the form and responding to complaints. DOLI anticipates that costs will be \$472,202 annually, beginning in FY 2023.

¹⁷ Weil, David & Pyles, Amanda, 2005. Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace. *Comparative Labor Law & Policy Journal*, 27(59). <https://hctar.seas.harvard.edu/files/hctar/files/hr08.pdf>.

¹⁸ Department of Labor and Industry (VA). (n.d.). *Labor and Employment Law Forms*. Labor & Employment Law. <https://www.doli.virginia.gov/labor-law/claim-for-unpaid-wages-form/>.

Fiscal Year	\$ Dollars	Positions	Fund
2022	N/A	0	N/A
2023	\$472,202	5.0	GF
Recurring (2023 -)	\$472,202	5.0	GF

DOLI anticipates five staff (FTEs), including three labor law compliance officers and two assistance compliance officers, will be needed to process the additional complaints resulting from an online form. DOLI previously established an online system for the receipt of child labor work permits and began receiving double the number of permit applications, likely due to the ease of submission. These submissions are often incomplete and require significant staff time for follow-up. Five employees are now dedicated to the processing of child labor permit submittals. Based on this experience, as well as the fact that recent legislation has added minimum wage and overtime wage claims to those processed by DOLI, the agency estimates that five additional staff are needed at a recurring cost of \$472,202.

The online form will require a technology solution in addition to staffing. The development of this form is included in the estimate for technology previously outlined under [Recommendation 3.](#)

- B. Outreach Campaign to Workers and Employers (Executive, Agency):** State enforcement agencies such as DOLI and Tax could jointly launch an education and outreach campaign in multiple languages that targets employees on state contracts with information about their rights and employers with their obligations. This would include close collaboration with labor unions, immigrant advocacy organizations, and employment attorneys who already have strong relationships with workers and employers. The approach could also serve as a pilot for a potential statewide approach to workers' education beyond state contracts.
- C. Certification and Professional Development for Contracting (Agency):** Any state employee who oversees capital outlay construction contracts with a value as defined by the applicable Appropriations Act could be required to take an online or face to face certification course by 2023. Information about new labor

laws specific to construction projects would also need to be integrated into any procurement officer annual training.

Recommendation 5. The Commonwealth should develop standards for the use of independent contractors on state job sites in order to prevent misclassification before it occurs.

As outlined in Governor Northam's 2020 Report from the Inter-Agency Taskforce on Misclassification and Payroll Fraud, "the misclassification of actual employees as independent contractors creates a competitive disadvantage for Virginia businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving protections and benefits to which they legally are entitled."¹⁹ The negative impacts are compounded when this practice occurs on state public works contracts, thereby limiting Virginia's ability to serve as a model employer for the private sector.

Recent Virginia legislation instituted significant penalties for misclassification, including debarment, as well as a private cause of action for victims. However, many states have gone further to establish standards and processes that proactively limit opportunities for contractors to misclassify workers. Additional research is needed, but the Commonwealth should consider one or more of the following approaches to prevent this damaging practice on state job sites.

Policies for Consideration

A. Independent Contractor Waiver Requirement (Legislative): Building on previously proposed legislation such as Senator McPike's SB 1305, the Commonwealth could establish an independent contractor waiver requirement whereby contractors on state public works projects may only permit the use of independent contractors by their subcontractors if they have received approval from the relevant contracting authority.²⁰ Versions of this model have been established in the Commonwealth for the Amazon, Inc. headquarters project in Northern Virginia²¹ and University of Virginia capital outlay projects, among others.

In alignment with SB 1305, the requirement would apply to all public bodies in a locality with a population in excess of 25,000 and covered institutions executing construction contracts of more than \$500,000.

However, the mandate should not limit contractors' use of subcontractors given the concerns of several

¹⁹ The Inter-Agency Taskforce on Misclassification and Payroll Fraud (VA), 2019, *Report for Executive Order 38 (EO38)*, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

²⁰ VA. S.B. 1305, 2021 Regular Session, 2021, <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1305>.

²¹ Sullivan, Patricia, December 14, 2019, *Amazon gets final approval for its new HQ in Arlington County, despite protest by organized labor*, The Washington Post, https://www.washingtonpost.com/local/virginia-politics/amazon-gets-final-okay-for-its-new-hq-in-arlington-despite-organized-labor-protest/2019/12/14/40b37760-1c90-11ea-b4c1-fd0d91b60d9e_story.html.

workgroup members that this would pose a significant barrier to their ability to complete projects. It is also recommended that the provision apply to all independent contractors, rather than just those representing over 10% of the cost of the project. Additional consideration is needed into the appropriate grounds for a waiver.

B. Independent Contractor Registration (Legislative, Agency): Virginia could require any independent contractor seeking to work on a publicly procured project to register through the Department of Professional and Occupational Regulation (DPOR) by 2023. This process would support independent contractors in knowing their employment rights, ensure that they have accurate information about misclassification, payroll fraud, and wage theft, and help employers identify independent contractors on the job.

A potential pitfall of this approach is the risk that employers will coerce workers, particularly those who are undocumented, into registering as independent contractors erroneously. In this case, a worker's registration would not have legal standing but could serve as a disincentive to speak up about misclassification if they are not aware of their rights. For this reason, it is critical that any registration process strike a balance between being accessible and requiring sufficient documentation from the worker to assert that an independent contractor status is accurate for their situation. Such documentation could include proof of liability insurance or workers' compensation.

An alternate version of this strategy could require registration by all independent contractors, regardless of their work in the private or public sector. Additional research is needed into the efficacy of this approach in Montana and the strategies for ensuring that registered independent contractors are not vulnerable to coercion or miseducation through the registration process.²²

²² Department of Labor and Industry (MT), (n.d.), Rule: 24.35.101, *Independent Contractor Exemption Certificate*, <https://rules.mt.gov/gateway/RuleNo.asp?RN=24%2E35%2E101>.

Additional Considerations

The following policies were submitted during the public comment period but require additional research before implementation. These may be areas for future study by the aforementioned Interagency Taskforce Against Worker Exploitation.

- ❖ Higher Education Procurement: Examine the existing procurement practices of higher education institutions and evaluate if any of the policies/procedures outlined in this report should be incorporated into their Memoranda of Understanding with the state.
- ❖ Wage and Hour Complaint Hotline: Establish a phone hotline as an easier means for workers to submit wage and hour complaints. DOLI currently has a phone number where individuals may receive assistance with filing, but the agency does not have a dedicated staff person available during all business hours and can only take one call at a time. A system upgrade and additional staff would be required.
- ❖ VDOT Prequalification Criteria: Amend VDOT's prequalification criteria to include more stringent scoring for violations of wage-and-hour, licensing, or safety laws.
- ❖ Ban on Bid Shopping: Explicitly prohibit practices that encourage bid shopping on public works projects.
- ❖ Construction-Specific Independent Contractor Criteria: As in New York, establish a separate standard for determining whether a worker is an independent contractor in the construction industry specifically.
- ❖ Expansion of Public Posting Requirements: Ensure that employers are required to publicly post all relevant information on employees' labor rights on state job sites.
- ❖ Public Works Registration Database: Require all contractors, subcontractors, and lower tier subcontractors to register with the state before bidding on or engaging in the performance of any work on which the payment of prevailing wage is required.
- ❖ Ensure Accurate Prevailing Wage Rates: Establish robust processes for the supplementation of Davis Bacon information by industry.

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Overview of Appendices

[Appendix A:](#) Workgroup Members & Contributors

[Appendix B:](#) Workgroup Presentations

[Appendix C:](#) Results of Public Comment Survey

[Appendix D:](#) Multi-State Survey of Relevant Labor Laws

Appendix A: Workgroup Members & Contributors

Budget language directed the Secretary to convene a workgroup of stakeholders including relevant state enforcement and contracting agencies, the business community, labor organizations, and public colleges and universities. The Secretary consulted additional subject matter experts as needed, who are listed below alongside members of the workgroup.

Greg Akerman - Northern Virginia Director, Baltimore/DC-Metro Building Trades

Brian Ball - Secretary of Commerce and Trade, Office of Governor Northam *(with designee John Begala, Assistant Secretary of Commerce and Trade)*

David Bailey - CEO, David Bailey Associates

Bernie Brill - Executive Director, SMACNA Mid-Atlantic Chapter

Craig Burns - Commissioner, Virginia Department of Taxation

Ernie Caldwell - President, G. J. Hopkins, Inc.

The Honorable Betsy B. Carr - Delegate, Virginia House of Delegates

Ike Casey - American Subcontractors Association

Fred H. Coddling - Attorney at Law

W. Mike Coppa - Director, Bureau of Capital Outlay Management, Virginia Department of General Services

Joseph Damico - Director, Virginia Department of General Services

Ray Davenport - Commissioner, Virginia Department of Labor and Industry

Robert Field - Hearing and Legal Services Officer, Virginia Department of Labor and Industry

Joe Flores - Secretary of Finance, Office of Governor Northam *(with designee June Jennings, Deputy Secretary of Finance)*

Sandra Gill - Deputy Director, Virginia Department of General Services

Arleen Green - Assistant Commissioner, Office of Compliance, Virginia Department of Taxation

James R. Harvey - Partner, Vandeventer Black LLP

Mary Helmick - Director of Procurement, Virginia Tech

Grindly Johnson - Secretary of Administration, Office of Governor Northam *(with designee Asif Bhavnagri, Assistant Secretary of Administration)*

The Honorable Paul E. Krizek - Delegate, Virginia House of Delegates

Victoria Leonard - Director of Policy and Strategic Communications, Liuna Mid-Atlantic Chapter

Tony Maggio - Legislative Fiscal Analyst, Virginia House of Delegates Appropriations Committee

John McHugh - Director of Procurement Services, Virginia Commonwealth University

Kimberly McKay - Legislative Fiscal Analyst, Virginia House of Delegates Appropriations Committee

Jason Parker - President, Virginia State Building & Construction Trades

Catherine Pasqualoni - Eastern Atlantic States Regional Council of Carpenters

Brandon Robinson - CEO, Associated General Contractors of Virginia

J. Adam Rosatelli - Legislative Fiscal Analyst, Virginia Senate Finance and Appropriations Committee

Felix Schapiro – Assistant Secretary of Labor, Office of Governor Northam

Anthony Smith - Vice President, Service Contracting of Va, Inc.

Jay Stoda - Business Unit Leader, DPR Construction

Donald Sundgren - Associate Vice President and Chief Facilities Officer, University of Virginia

JT Thomas - Executive Director, Washington D.C. Chapter, National Electrical Contractors Association

Lawrence Wilder - Senior Policy Advisor, Virginia Department of Small Business and Supplier Diversity

*Report drafted by Meaghan Green, Policy & Communications Advisor to the Virginia Secretary of Labor

Appendix B: Workgroup Presentations

Labor Law and State Capital Construction Process Workgroup

Megan Healy

May 17, 2021

House Appropriations Committee

State Employee Membership

- House Appropriations Staff- Kim and Tony
- Senate Finance Staff- Adam
- Secretary of Administration
 - Department of General Services
- Secretary of Finance
 - Department of Taxation
- Secretary of Commerce and Trade/Chief Workforce Advisor
 - Department of Labor and Industry
 - Department of Professional Occupational Regulations
 - Small Business and Supplier Diversity
- Higher Education Procurement- UVA, VCU

External Stakeholder Membership

- LIUNA
- Building Trades Virginia and Northern Virginia
- Associated General Contractors of Virginia (3 members)
- Ernie Caldwell- Virginia Board of Workforce and GJ Hopkins President

Initial Report Considerations

- ***Data and Technology Solution-*** With the enactment of new worker laws, agencies need to work together to develop data collection standards with similar fields to help support the sharing of data amongst enforcement agencies. A Data Sharing Agreement or MOU should be signed to share information of employers who are currently being investigated or found guilty of unlawful business practices. A new technology solution might be needed to help share information and communicate amongst the agencies. (Executive Branch/Agencies)

Initial Report Consideration S

- **Coordination-** An interagency taskforce needs to be formed and meet regularly to discuss data collection, examine enforcement strategies, engage with the public through multiple methods of public comment, and develop ongoing recommendations to the General Assembly and Governor. (Executive Branch)
- **Executed Contracts-** With support from the Office of the Attorney General, language about misclassification, payroll fraud, and wage theft needs to be added to general contractor agreements as well as any subcontractor on the job site. Posting the executed contracts, that includes employee and independent contractors' rights, in a public place on each site should be required. (Agency/Regulations/Legislative).

Initial Report Consideration S

- **Certification and Professional Development-** Any state employee who oversees large capital outlay construction contracts with a value defined by the applicable appropriation, must take an online or face to face course to be certified by 2022. Information about new labor laws specifically to construction projects will be integrated into any procurement officer annual training. Ongoing professional development will be needed for recertification and of best practices. (Agency)
- **Independent Contractor Registration-** Any independent contractor who works on a publicly procured project must be registered through the Department of Professional and Occupational Regulations by 2023. This registration will help independent contractors know their rights, provide better education around misclassification, payroll fraud, and wage theft as well as help employers identify independent contractors on the job. (Agency/Legislative)

Initial Considerations

- **Competitive Bid Process-** The competitive bid process will be examined to see how the state can support general contractors who exhibit good business practices while making sure small and minority owned businesses are equally competitive, as well as identify general contractors who comply with contract terms.
- **Future Research and Stakeholder Engagement-** More research needs to be done on other states' solutions to the workers who have been mistreated on state government projects. Also, additional stakeholders such as agency procurement officers and project managers, general contractors, and workers need to be interviewed for the final report.

Report Questions

- What is the current landscape of worker protection laws at the state and federal level (Worker Misclassification, Wage Theft, Prevailing Wage)?
- How does each worker protection law fit into the context of Virginia's procurement statutes for state agencies, higher education, and transportation?
- What are the opportunities to better align procurement law, practice, and procedure with Virginia's worker protection statutes?
- How are employees and employers educated about laws and enforcement?
- What are the options for the employee when there is a potential violation under current federal and state law?
- How will the agencies balance compliance versus enforcement?
- What models are used in other states for prevention? What costs are associated with each model?
- What models are used in other states for enforcement?

Report Questions

- What are the legal consequences for businesses who do not follow certain labor laws?
- What are the gaps in the current law that lead labor brokering? How do you close gaps? Advocates believe transparency measures will close those gaps
- What contractors need to submit certified payrolls? When does that happen now? Under what statutes? When do investigations take place? Who has the authority to do it now?
- How does higher education and transportation fit into a potential remedy each with differing procurement statutes? Should all state agencies have the same regulations when it comes to labor laws?
- How do potential changes to Virginia's procurement law impact the vendor pool available to participate on state contracts? What are the budgetary implications of limiting the vendor pool?
- What are long term and short-term solutions?
- What is root of the issues? Funding? Low bid contracts?

Timeline

- May-Procure services and hire project manager
- June- Meeting, Presentation by Tax and DOLI on enforcement
- July- Draft recommendations and research other states
- August- Town Halls, Focus Groups, Public Comment
- September- Finalize recommendations
- October- Report due
- November- Draft legislation and budget amendments

DEPARTMENT OF LABOR AND INDUSTRY PRESENTATION

Labor Law and State Construction Process Work Group

June 29, 2021

DOLI PROGRAMS ON WAGE THEFT AND MISCLASSIFICATION

- Labor and Employment Law Division
- Occupational Safety and Health
Enforcement

LABOR LAW STATUTES - DOLI

- § 40.1-29 – Payment of Wage
- § 40.1-28.10 – Minimum Wage – May 1, 2021
- § 40.1-29.1 – Expanding Payment of Wage Inspections – July 1, 2020
- § 40.1-29.2 – Overtime Wage – July 1, 2021
- § 40.1-33.1 – Anti-Retaliation – Misclassification – July 1, 2020
- § 40.1-33.2 – Anti-Retaliation – Payment of Wage – July 1, 2020

LABOR LAW STATUTES - EMPLOYEE

- § 40.1-27.3 – Anti-Retaliation – Employee Enforced
- § 40.1-28.7:7 – Misclassification of Workers
- § 40.1-29.J – Private Right of Action

PAYMENT OF WAGE

Year	Wages Due	Wages Collected	Orders Entered	Civil Penalties
Current	\$203,156	\$151,156	\$72,000	\$20,000
2020	\$272,029	\$235,363	\$81,835	\$35,950
2019	\$456,985	\$303,181	\$180,491	\$42,850
2018	\$347,567	\$270,485	\$77,082	\$29,300
2017	\$325,787	\$263,557	\$91,530	\$29,300

LABOR LAW EXPANDED INSPECTIONS

- Expanded five inspections so far.
- As few as four employees affected and up to 147 employees
- Others under consideration for expansion

LABOR LAW MINIMUM WAGE AND OVERTIME

Minimum Wage in effect since May 1 with no complaints

Overtime Wage not in effect yet.

LABOR LAW ANTI-RETALIATION STATUTES

Receive six complaints about retaliation in payment of wage cases

No complaints about retaliation in misclassification cases yet

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH VOSH

VOSH ENFORCEMENT

- Misclassification not primary focus of inspections
- Investigations look into who is working at the site to determine who is the responsible employer and how many employers should have inspections opened
- As part of the questions for inspections on construction sites we ask each contractor on site about DPOR licensure
- Enforcement Policy on Misclassification in place since July 2015

REFERRALS MADE

- In the last year VOSH has made 44 referrals to DPOR
- VOSH made 20 referrals to VEC
- Between July 2015 and December 2019, 173 cases were reported to DPOR
 - 115 resulted in violations
 - \$75,000 in penalties

ENFORCEMENT WHEN UNLICENSED CONTRACTORS ONSITE

- VOSH refers the contractor that hired the unlicensed contractors to do work to DPOR
- VOSH refers the unlicensed contractor to DPOR
- VOSH makes referrals to VEC when the contract value of the unlicensed subcontractors work is less than \$1,000
- Employers that hire unlicensed subcontractor are not given reductions for size and good faith

Virginia Tax Worker Misclassification Program

June 29, 2021



Virginia Tax's Role in Misclassification of Workers



Worker Misclassification: Virginia Tax's Role

3

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- ▶ Provides that if an individual performs services for an employer for remuneration, they shall be considered an employee for Virginia tax purposes unless demonstrated to be an independent contractor
- ▶ Virginia Tax is required to use the IRS guidelines to determine whether a worker is an employee or independent contractor



Worker Misclassification: Virginia Tax's Role

4

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- ▶ Imposes a civil penalty for misclassification in the following amounts:
 - ▶ Up to \$1,000 per misclassified individual for the first offense
 - ▶ Up to \$2,500 per misclassified individual for the second offense
 - ▶ Up to \$5,000 per misclassified individual for the third offense or any subsequent offenses
- ▶ Prohibits all public bodies and covered institutions from awarding a contract to an employer that misclassifies for the following time periods:
 - ▶ Up to one year from the date of the notice for a second offense
 - ▶ Up to three years from the date of notice for a third or subsequent offense



Worker Misclassification: Virginia Tax's Role

5

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- ▶ Provides Tax Commissioner with the authority to share information
 - ▶ Department of Labor and Industry (DoLI)
 - ▶ Virginia Employment Commission (VEC)
 - ▶ Department of Small Business and Supplier Diversity
 - ▶ Department of General Services (DGS)
 - ▶ Workers' Compensation Commission
 - ▶ Department of Professional and Occupational Regulation (DPOR)
- ▶ Provides authority to these agencies to share any information with Virginia Tax that can assist in proper classification of employees



Worker Misclassification: Virginia Tax's Role

6

Worker Misclassification: Annual Report

- ▶ Virginia Tax is required to report annually on enforcement of this bill to the Governor and General Assembly
- ▶ The report must cover items including:
 - ▶ The number of investigated reports of worker misclassification and the findings of such reports
 - ▶ The amount of combined tax, interest, and fines collected
 - ▶ The number of referrals to DoLI, VEC, the Department of Small Business and Supplier Diversity, the Workers' Compensation Commission, and DPOR



Misclassification Audit Program



Worker Misclassification: Audit Program

8

Audit Program Resourcing

- ▶ Funding provided to create a misclassification audit program with nine staff
 - ▶ One misclassification audit manager
 - ▶ Three misclassification auditors
 - ▶ Two tax examiners
 - ▶ Withholding tax focus
 - ▶ Three support staff:
 - ▶ Business analyst, training and field education specialist, and wage administrative staff
-
- ▶ Pandemic impacted original staff hiring and training timeline



Worker Misclassification: Audit Program

9

Audit Program Implementation

- ▶ First pass of about 30 businesses to program for audits identified by February 1 and developed using:
 - ▶ Data reported to Virginia Tax
 - ▶ W-2, 1099, withholding data
 - ▶ North American Industry Classification System (NAICS) codes
 - ▶ Referrals from other agencies
 - ▶ Auditor recommendations
- ▶ Auditing for misclassification issues and withholding tax compliance
 - ▶ Senior auditors are working closely with new auditors doing onsite audits



Worker Misclassification: Audit Program

10

IRS Guidelines Required to Make Determination

- ▶ Traditionally, the IRS guidelines used to help make a determination of employee vs. contractor comprised 20 factors
- ▶ In 2020, 20 factors essentially condensed into three broad categories
 - ▶ Behavioral control, financial control, and relationship of the parties
- ▶ Generally, IRS requires consideration of all information in a case that helps decide the extent to which the taxpayer does or does not retain the right to control the worker
 - ▶ Not all factors may be relevant in each case and some may be more relevant than others



Worker Misclassification: Audit Program

11

Virginia Tax Administrative Appeals Process

- ▶ Legislation adopted in 2020 also provides taxpayers subject to a misclassification penalty the right to
 - ▶ Appeal action to the Tax Commissioner within 90 days of assessment
 - ▶ Apply to circuit court for relief
 - ▶ Three years from date of assessment or final determination
 - ▶ One year from date administrative appeal concluded
- ▶ Collections/debarment placed on hold until appeal or court action complete
- ▶ Same process available to taxpayers for all taxes administered by Virginia Tax



Worker Misclassification: Audit Program

12

Virginia Tax Administrative Appeals Process

- ▶ Completed appeals published on agency website in Laws, Rules, and Decisions section and available to all interested parties
 - ▶ Used by practitioners, taxpayers and agency audit staff
- ▶ Recent appeals addressing worker misclassification:

Document	Topic
PD 21-56	Discusses and adopts new IRS criteria for evaluating/determining worker misclassification
PD 20-170	Issuance of Form 1099 instead of W-2 not sufficient evidence to determine worker misclassification
PD 18-107	Information provided by VEC not sufficient to make a determination concerning worker misclassification



Worker Misclassification Program Communications Strategy



Worker Misclassification: Communications Strategy

14

Communications Strategy: Focus on Outreach

- ▶ Drive education & awareness
 - ▶ Prevent vs. punish
 - ▶ Define terms, share resources
 - ▶ Make both “presented” and “self-service” content accessible
 - ▶ Presented – speaker for industry meetings, online webinars
 - ▶ Self-service – web page, video, social media



Worker Misclassification: On Our Website

15



Worker Misclassification: What You Need to Know

Worker misclassification describes incorrectly identifying individuals as independent contractors when they are really employees.

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[Rulings & Decisions](#)
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Worker Misclassification: What You Need to Know

What is Worker Misclassification?

Worker misclassification describes incorrectly identifying individuals as independent contractors when they are really employees.

Effective January 1, 2021, changes adopted by Virginia's General Assembly explicitly conform to the IRS definition of worker misclassification. This definition assumes that an individual performing services for an employer for remuneration — payment for their work or services — is an employee unless the business can show that the individual is an independent contractor according to IRS guidelines. Virginia Tax will use [applicable IRS guidelines](#) to make worker classification determinations.

Virginia's Office of the Attorney General has launched a Worker Protection Unit, a multidisciplinary team of prosecutors and attorneys who will focus on educating Virginia workers on their rights, and investigating, stopping, and prosecuting exploitation of Virginia workers, including wage theft and worker misclassification. Virginia Tax will engage with the Worker Protection Unit as requested and allowed by law.

Why is Worker Misclassification Important?

Virginia Tax is conducting regular audits looking into worker misclassification. Businesses that misclassify their workers can be found liable for civil penalties.

How to Classify Your Workforce

As a general rule, anyone who performs services for you is your employee if you have the right to control both what will be done and how it will be done.

The [IRS Guidelines](#) for classifying workers fall into 3 categories (behavioral control, financial control, and type of relationship) with assessment questions for each.

- **Behavioral control:** Does the employer control or have the right to control what the worker does and how the worker does their job?
- **Financial control:** Are the business aspects of the worker's job controlled by the payer? This includes aspects such as how the worker is paid, who provides tools and supplies, etc.
- **Type of relationship:** Are there written contracts or employee-type benefits such as pension plans, insurance, vacation pay, etc.?



Worker Misclassification: Media Interest

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Virginia Tax Department Explains Worker Misclassification

Undated

Full text Published By Tax Analysts

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Worker Misclassification: Communications Strategy

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Communications Strategy: Focus on Outreach

- ▶ Solicit input for our frequently asked questions (FAQs)
 - ▶ Reach out to business and industry groups to hear their constituents' questions about worker misclassification
 - ▶ Answer those questions in an FAQ format
 - ▶ Post FAQs on tax.virginia.gov/worker-misclassification
 - ▶ Share answers via social media posts
 - ▶ Add FAQs to slides for presented content



Worker Misclassification: Communications Strategy

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Communications Development and Distribution – Planned Tactics

Audience	Key Messages	Channels
Public/all taxpayers	<ul style="list-style-type: none"> • Overview of worker misclassification • Awareness content re: audit practices 	<ul style="list-style-type: none"> • Website content • Social media posts
Business community	<ul style="list-style-type: none"> • Overview of worker misclassification • Awareness content re: audit practices • How-to for determining worker classification 	<ul style="list-style-type: none"> • News release for general business publications • Authored content for specific industry publications • Website content • Social media posts
Professional organizations for target industries	<ul style="list-style-type: none"> • Overview of worker misclassification • Awareness content re: audit practices • How-to for determining worker classification 	<ul style="list-style-type: none"> • Self-service presentation on housed website • Video/virtual speaker for professional development events



Going Forward

Worker Misclassification: Going Forward

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Next Steps and Lessons Learned

- ▶ Continue to identify categories of business/industries for potential audits
 - ▶ Refine data needs and availability
- ▶ Communicate with IRS regarding availability of any federal worker misclassification data
- ▶ Continue rollout of worker misclassification communications program
- ▶ Complete worker misclassification guidelines

**Worker Misclassification: Going Forward**

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Next Steps and Lessons Learned

- ▶ Expand/enhance technology and data analytics
 - ▶ Increases audit viability and improves sustainability of audit findings
- ▶ Appropriate placement in Office of Compliance
- ▶ Additional staff needs:
 - ▶ Program Director
 - ▶ Data analyst or dedicated programmer/developer
 - ▶ Auditors and audit team lead to conduct additional audits



Appendix C: Results of Public Comment Survey

Respondents

57 responses to the public comment survey were received on behalf of the following organizations representing contracting employers, public works employees, independent contractors, and state regulatory and enforcement agencies:

- ❖ Associated General Contractors Of Virginia
- ❖ Mid-Atlantic LECET
- ❖ IBEW
- ❖ LiUNA!
- ❖ Independence Excavating, Inc
- ❖ Operating Engineers
- ❖ Eastern Millwright Regional Council
- ❖ Chewning & Wilmer, Inc.
- ❖ Eastern Atlantic States Regional Council of Carpenters
- ❖ Iron Workers Local Union 79
- ❖ MAROC
- ❖ IAM&AW LL10
- ❖ RJATC
- ❖ Pile Drivers/Divers Local 474
- ❖ International Brotherhood of Electrical Workers Local 666
- ❖ Sprinkler Fitters Local 669
- ❖ Virginia Department of Small Business and Supplier Diversity
- ❖ Iron Workers Employers Association of Washington, D. C. (IWEA)
- ❖ BAC Local 8 SE.
- ❖ Branch Civil
- ❖ United Food and Commercial Workers Local 400
- ❖ Richmond Electricians JATC
- ❖ Mid-Atlantic Pipe Trades
- ❖ Ironworkers International
- ❖ Service Contracting of Virginia Inc
- ❖ University of Virginia
- ❖ Vandeventer Black LLP
- ❖ ATU Local 1177
- ❖ UA Local Union 110
- ❖ VA Building Trades
- ❖ Virginia Tech Procurement
- ❖ CWA Virginia State Council
- ❖ UAW Local 2069
- ❖ Folkes Electric
- ❖ IUPAT DC 51
- ❖ Virginia Office of Emergency Medical Services
- ❖ Virginia Commonwealth University
- ❖ Virginia Department of General Services
- ❖ ASA of Metro Washington
- ❖ Foundation for Fair Contracting - Mid-Atlantic Region
- ❖ Virginia Department of Labor and Industry
- ❖ Alliance for Construction Excellence (ACE)
- ❖ Construction Contractors Council
- ❖ CWA Local 2204
- ❖ Virginia Department of Taxation
- ❖ Baltimore Washington Laborers' District Council

Survey Questions

Respondents were asked to indicate their support for the following nine strategies for combating the mistreatment of workers on state public works projects. These do not represent a comprehensive list of those ultimately included in this report.

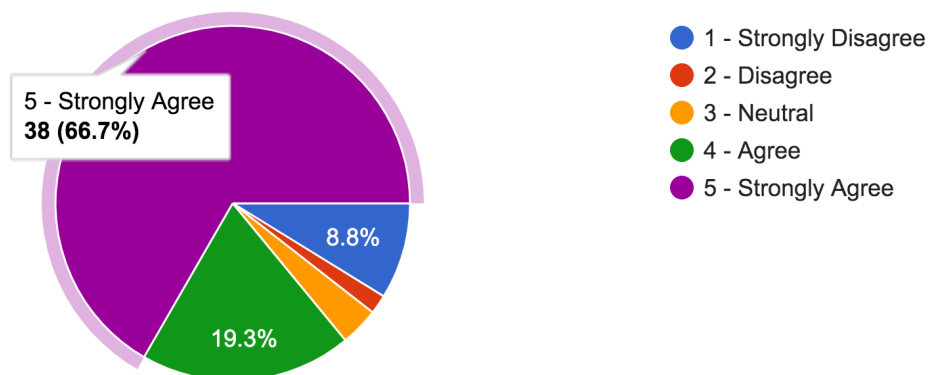
1. Virginia employers found to have violated state wage laws should be debarred from bidding on and receiving awards for public works contracts, in alignment with existing penalties for misclassification.
2. Virginia should establish a monthly payroll certification requirement for contracting employers to ensure that they are meeting their prevailing wage (i.e. Little Davis Bacon Act) obligations throughout the length of their state contract.
3. An interagency task force should be formed to analyze strategic labor law enforcement strategies for potential implementation in Virginia and develop ongoing recommendations to the General Assembly and the Governor. For the purposes of this survey, “strategic enforcement” is defined as an approach that uses limited agency resources in a strategic and data-driven manner in order to enhance the overall impact of state labor law enforcement on employer behavior.
4. Virginia should require enforcement and contracting agencies to establish data collection standards and a data-sharing agreement to share information on employers who have been found guilty of labor law violations.
5. Virginia should work to enhance data collection on and monitoring of subcontractors to ensure that the state has sufficient information about all actors working on state projects.
6. Virginia should establish a reciprocal debarment statute that ensures any contractor debarred by the U.S. Department of Labor for labor law violations is also debarred from working on Virginia public works projects.
7. Virginia should establish a requirement that any independent contractor who works on a publicly procured project must register through the Department of Professional and Occupational Regulation (DPOR) by 2023.

8. The Virginia Department of Labor (DOLI) should establish an online form for all Virginia workers, including those employed by state contractors, to electronically submit complaints of potential wage theft in addition to by mail.
9. Virginia should coordinate with state enforcement agencies to create an education and outreach campaign targeting employees on state contracts about their rights under the law. This would include close collaboration with organizations that already have strong relationships with workers and could serve as a pilot for a potential statewide approach to workers' education (beyond state contracts).

Results

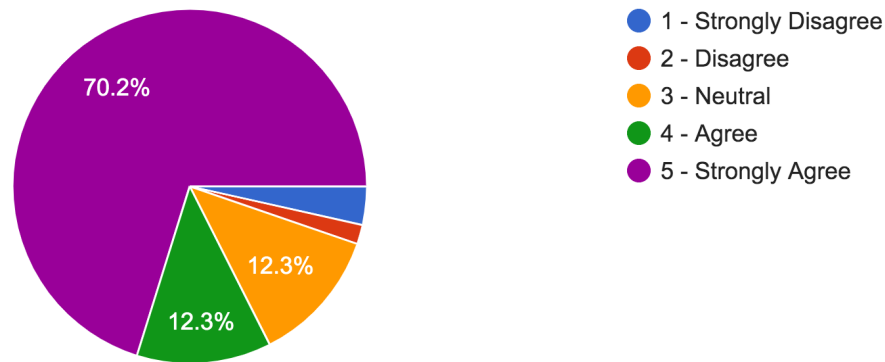
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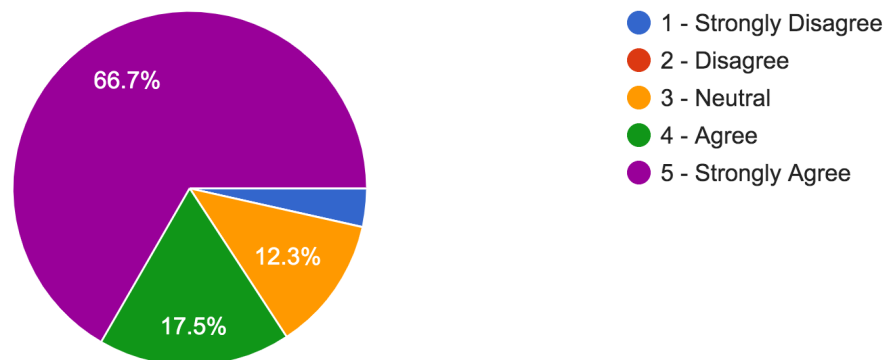
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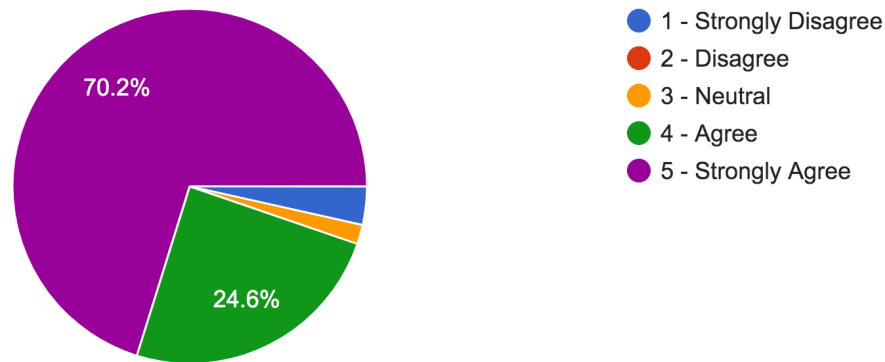
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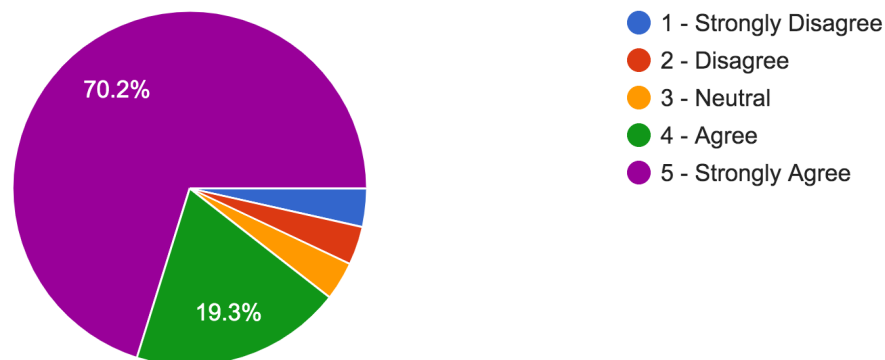
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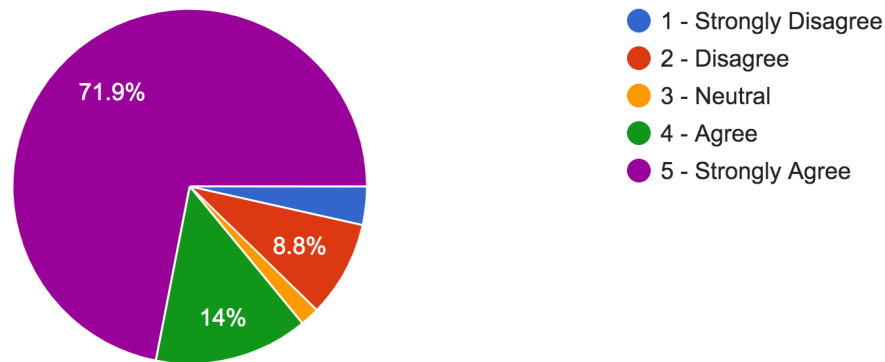
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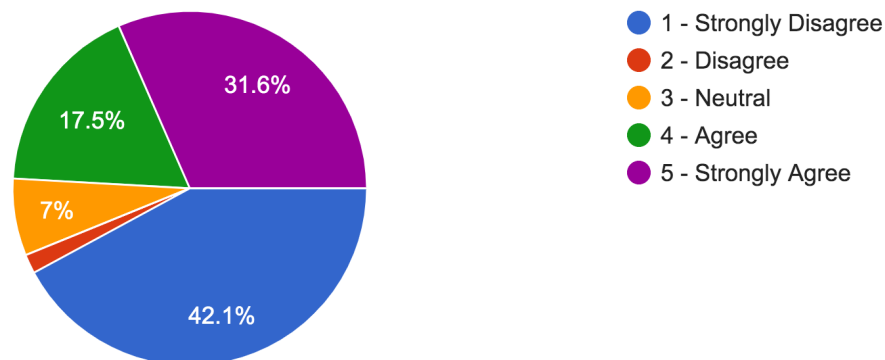
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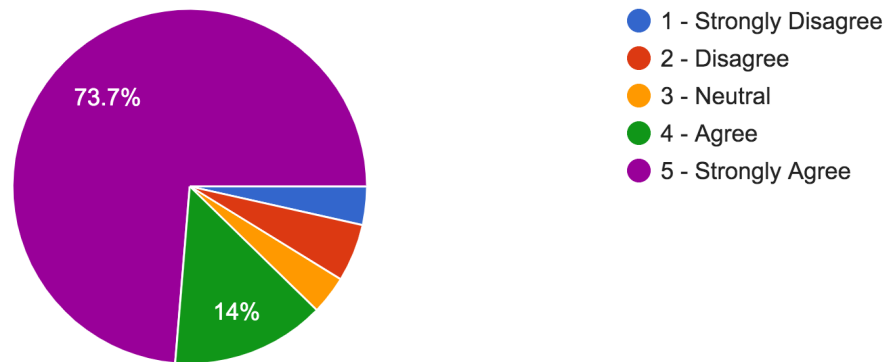
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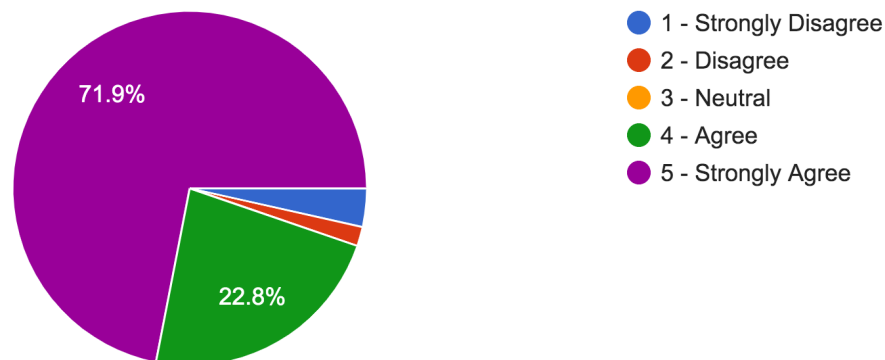
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Appendix D: Multi-State Survey of Relevant Labor Laws

The report that follows responds to a request from Secretary Healy to survey certain wage and hour-related statutes in 11 states (Connecticut, Illinois, Maryland, Minnesota, Montana, Nebraska, New Jersey, New York, Pennsylvania, Oregon, and Washington), with a focus on wage theft, worker classification, and prevailing wages issues.²³ More specifically, our team was asked to identify statutes in these 11 states that:

- ❖ address wage theft, by that name or otherwise;
- ❖ require or authorize state agencies to share information and coordinate actions regarding employers found to have engaged in wage and hour violations, especially in the field of employee misclassification;
- ❖ prescribe standards or principles by which employee/independent classification decisions are made;
- ❖ address exempt/nonexempt standards for considering alleged wage and hour violations;
- ❖ specifically address payroll fraud by government contractors;
- ❖ impose payroll certification requirements as part of a public project prevailing wage statute; and
- ❖ provide civil or criminal sanctions for “labor trafficking.”

We hope this report is useful in considering “next steps” in the Commonwealth’s efforts to strengthen wage and hour and procurement compliance by its contractors, and more broadly, to provide its citizens with an assurance that employers are complying with their statutory obligations and that their tax money is well spent. It has been an honor to help advance that important policy goal.

²³ The GMU team was assigned research and reporting tasks. The information contained in this report is provided for informational purposes, and should not be construed as legal advice on any subject or to create an attorney-client relationship.